

Het merkdepot te kwader trouw

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THE CODIFICATION OF INTELLECTUAL PROPERTY LAW: THE LEGACY OF E.M. MEIJERS
AND RECENT TRENDS IN EUROPE

This short contribution is dedicated to the 10-year anniversary of the *E.M. Meijers Institute of Legal Research*. The Institute was founded upon the legacy of exceptional achievements and values of the legendary Prof. Eduard Maurits Meijers (1880-1954), who still today continues to be a source of inspiration for the research programs and faculty members at Leiden University.

Meijers' proposal

Although Meijers is mostly remembered for his efforts for the codification of book 1-8 of the Dutch Civil Code, his work is also associated with intellectual property law, especially with regard to his proposal in 1953 and 1954 to integrate all Dutch intellectual property law(s) in a single statute and incorporate this in the Dutch Civil Code as well.⁹ Meijers reserved book 9 of the Civil Code for the re-codification of IP law and proposed to include the follow IP legislation: (I) Copyright, (II) Patents, (III) Designs, (IV) Trade Marks,

⁹ E.M. Meijers, *Ontwerp voor een Nieuw Burgerlijk Wetboek. Toelichting Eerste Gedeelte (boek 1-4)*, 1954, p. 9, 11, 18. Also published in C.J. van Zeven, *Parlementaire geschiedenis van het nieuwe burgerlijk wetboek. Algemeen deel: Voorgeschiedenis en algemene inleiding*, Kluwer 1962, p. 35, 127.

(V) Trade Names. ¹⁰ Despite the fact that the government actually officially approved Meijers' proposal, the project never materialized, following Meijers' death in 1954.

Dutch dismissal

It was only 40 years later, in 1993 and 1994, that the Dutch government properly considered Meijers' proposal by instructing Prof. J.J. Brinkhof to investigate the possibilities of incorporating Dutch legislation regarding intellectual property in a single charter in the Dutch Civil Code. Although Prof. Brinkhof did sympathize with Meijers' initial proposal, he quickly decided that incorporating all Dutch IP laws in the Dutch Civil Code was neither feasible nor desirable.¹¹ Instead of full codification, Prof. Brinkhof suggested to opt for a less ambitious plan by only aiming for codification of common rules on proprietary aspects of IP rights such as legal status, transfer, licensing etc, as well as on procedural rules concerning the enforcement of IP rights. However, after the resignation of Prof. Brinkhof in 1997 and despite the government's promise to continue its investigations and publish a legislative proposal in 1998, the plan of partial codification was basically ditched and is now (almost) forgotten.

One can agree or disagree with the decision of the Dutch government and Brinkhof not to opt for a full re-codification of Dutch IP laws. Dutch literature is divided in this regard, with Gerbrandy, De Vries and Snijders opposing and Cohen Jehoram, Hartkamp, Holzhauser and Van Nispen favouring full re-codification of Dutch IP law in a single charter.¹² Obviously, apart from the

¹⁰ Van Zeben 1962, p. 35. It was originally envisaged to put the codification of IP law in 'book 8', but after the inclusion of law of succession in book 4, this was subsequently re-numbered into 'book 9'.

¹¹ Letter of Minister of Justice W. Sorgdrager of 28 April 1995 to Dutch Parliament, TK 1994-1995 no. 23 900 VI, 24; J.J. Brinkhof, 'De codificatie van de rechten van de intellectuele eigendom in Boek 9 Burgerlijk Wetboek. Een tussenbalans', *BIE* 1997, p. 279.

¹² The opposition of P.S. Gerbrandy (*Hand. II* 1952-1953, p. 2915) however got an effective rebuttal from Meijers himself during parliamentary discussion in 10 September 1953 (p. 2918), which resulted in the Dutch government officially approving Meijers' proposal (see also Cohen Jehoram, *NJB* 1983 p. 1215). Also *opposing Meijers' proposal*: L. De Vries, *NJB* 1984 p. 15; W. Snijders, *UCV* 82 d.d. 4 april 1984, *Hand. II* 1983-1984 18 113 p. 82-12. *Supporting Meijers' proposal*: H. Cohen Jehoram, *NJB* 1983 p. 1212-1216, *NJB* 1984 p. 15-16 en *NJB* 1997 p. 2059-2060; A.S. Hartkamp, *Ars Aequi* 1991 p. 1114-1115 and *AMI* 1991 p. 211-212; C.J.J.C. van Nispen, *BIE* 1992, p. 282-285 and Holzhauser, *Inleiding Intellectuele Rechten*, Bju 2005, p. 15-16.

feasibility, the desirability and necessity of such codification should also be considered. With regards to the necessity, it must be stressed that many key jurisdictions in Europe such as the United Kingdom and Germany do not have a single code of intellectual property, and legal practice seems to manage quite well without it. Consequently, an urgent need for a single IP code is not (yet) apparent. On the other hand however, recent developments across Europe do indicate that an increasing number of national legislators have decided to opt for a partial unification of industrial property law, indicating that such codification is both desirable and feasible.

From Portugal to Poland: recent trends

Despite the Dutch decision in 1997 not to opt for the creation of a single code, important examples of the various possibilities of such unification could be found in the *Code de la Propriété Industrielle* of France of 1992 and also in the old *Código da Propriedade Industrial* of Portugal of 1995. Furthermore, recent examples are to be found in the Polish *Prawo własności przemysłowej* of 2000 and in the Slovenian *Zakon o industrijski lastnini* of 2001, as well as in the Portuguese revision of their *Código da Propriedade Industrial* in 2003. This trend towards the codification of separate IP laws in a single charter, is only further confirmed by the recent enactment of the Italian *Codice dei Diritti di Proprietà Industriale* in 2005.¹³

A number of conclusions can be inferred from the developments mentioned above. First, it must be observed that none of the EU member states decided to incorporate its legislation in their Civil Code, as originally envisaged by Meijers. Second, all legislation mentioned above is limited to the unification of *industrial property* laws (patents, trade marks, designs etc.) and, contrary to Meijers' original suggestion, does not include other *intellectual property* rights such as copyrights. However, this does not take away from the fact that there is a clear trend in Europe towards incorporating all industrial property legislation into a single statute.

¹³ France: Loi du 1.7.1992 nr. 52-597; Portugal: Act of 24.1995, nr 16/95, amended by Act of 5.3.2003, nr. 36/2003; Poland: Act of 30.6.2000, amended by Act of 23.1.2004, Official Gazette 2.3.2004, no. 33/286; Slovenia: Act of 23.05 2001, Official Gazette RS no. 45/2001, amended by Act of 6.2.2006, Official Gazette RS no. 51/2006; Italy: Act of 10.2.2005, no. 273.

From Russia with love: recent recognition of Meijers' proposal

Recently, full recognition of Meijers' proposal can be found in Russia.¹⁴ In the autumn of 2006, the fourth and final part of the Russian Civil Code was adopted, containing a full codification of all intellectual property legislation into a single charter in the Civil Code and thereby fully adopting Meijers' original plan.¹⁵ This is however, no coincidence, since drafting the Russian Civil Code happened in close consultation with several law professors of Leiden University, such as Prof. F.J.M. Feldbrugge and, with regard to intellectual property law, prof. mr. D.W.F. Verkade.

Back to the Netherlands: the 2007 implementation of the Enforcement Directive

It has already been suggested by Verkade that the achievement of the Russian Federation may cause new inspiration in the Netherlands as well.¹⁶ I certainly hope so. In addition to the recent trends abroad, other domestic developments in the Netherlands are also relevant in this regard. The fact that in 2007 several procedural rules of the IP Enforcement Directive were implemented in a single chapter in the Dutch Code of Civil Procedure could indicate that the Dutch legislator might be willing to reconsider its position with regard to incorporating other common rules of IP law under the Dutch Civil Code as well.¹⁷ Such common rules could pertain to the subjects which were already studied and proposed in the 1997 Brinkhof report, such as the legal status, transfer and licensing of IP rights, as well as common provisions concerning typical claims in IP disputes such as claims for damages, destruction and loss of profits etc. With regard to the latter, it must be stressed that the Dutch legislator did not seize the opportunity to propose such common provisions as yet, and instead opted for fragmentarized implementation in each separate IP law. However, the Explanatory Memorandum also acknowledged that most

¹⁴ Dutch literature was rather critical about Russian IP law, 14 years earlier: see C. Prins, 'Handhaving van nieuwe intellectuele eigendoms wetgeving laat Russen vooralsnog Siberisch koud', *AMI* 1994, p. 23.

¹⁵ Part IV of the Russian Civil Code is called 'Rights for intellectual activity's results and means of individualization' and is scheduled to enter into force on January 1, 2008.

¹⁶ D.W.F. Verkade, Speech delivered on the conference dedicated to the 15th anniversary of establishment of the arbitration courts system of the Russian Federation and of the private law research center under the president of the Russian Federation, Moscow, April 25, 2007, published on www.boek9.nl B9 3899.

¹⁷ *Staatsblad* 2007/108: Book III, title 15 - 'Van rechtspleging in zaken betreffende rechten van intellectuele eigendom'.

claims typical to IP disputes (such as injunction, cancellation, damages, claim for profits, seizure, destruction, disclosure of information, recall and rectification) all originate in article 3:296 and 6:162 of the Dutch Civil Code, which only confirms Meijers' view in 1953 and provides a promising starting point for further legislative proposals in the future.¹⁸

Conclusion

Although after Meijers' proposal in 1953 the chances of creating a single charter of industrial property law in the Netherlands have diminished because of the fact that the majority of Dutch industrial property law (trade marks and designs) is now governed by uniform Benelux law precluding any legislative changes on a national level, incorporating a single charter on the aforementioned common rules in the Dutch Civil Code is certainly a feasible possibility. In that regard, and given recent developments in the EU and Russia, the legacy and ground-breaking proposal of E.M. Meijers will remain as important as ever.

¹⁸ Compare MvT, TK 2005–2006, 30 392, nr. 3 p. 5 with the statement from E.M. Meijers on 10 September 1953 (Hand. II 1952-1953, p. 2918).

Ik zou het zo weer doen

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